

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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JUN 28 2006

Federal Communications Commission  
Office of Secretary

In the Matter of )  
)  
Fones4All Corp. )  
Petition for Expedited Forbearance Under )  
47 U.S.C. § 160(c) and Section 1.53 )  
from Application of Rule 51.319(d) )  
To Competitive Local Exchange )  
Carriers Using Unbundled Local Switching )  
to Provide Single Line Residential )  
Service to End Users Eligible for State )  
or Federal Lifeline Service )  
)

WC Docket No. 05-261

APPLICATION FOR REVIEW

Fones4All Corporation ("Fones4All"), pursuant to section 1.115<sup>1</sup> of the Commission's Rules, hereby applies for review of the June 8, 2006 Order adopted by the Wireline Competition Bureau ("Bureau" or "WCB").<sup>2</sup> In the Order the Bureau, acting upon purported delegated authority<sup>3</sup> and citing the same standard language it routinely uses to grant itself extensions of the section 10 twelve- month deadline for action on forbearance petitions ("significant questions regarding whether forbearance from applying the ... rules meets the statutory requirements set forth in section 10(a)), the WCB extended by 90 days to September 28, 2006 the date which the

<sup>1</sup> 47 C.F.R. § 1.115

<sup>2</sup> See Order, WC Docket 05-261, DA 06-1240 (rel. June 8, 2006) ("Order").

<sup>3</sup> Congress carefully circumscribed the Commission's authority to delegate its authority, and any such delegation of authority much be done by rule or order. 47 U.S.C. § 155(c). Fones4All has been unable to identify the rule or order by which the Commission delegated to the Chief of the Wireline Competition Bureau the authority to extend the statutory deadline set by Congress in Section 10(c) of the Act, 47 U.S.C. § 160(c). In any event, as explained below, such delegation is inappropriate and even if it were appropriate, the Order offers no explanation regarding why extension of the deadline is "necessary" within the meaning of section 10(c). *Id.* Indeed, the Order fails to even use the word "necessary" at all.

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Petition requesting forbearance filed by Fones4All shall be deemed granted.<sup>4</sup> The Bureau may not act on delegated authority to extend the statutory deadline set forth in section 10. Rather, section 10 of the Act is very clear: “The **Commission** may extend the initial one-year period by an additional 90 days if the **Commission** finds that an extension is **necessary** to meet the requirements of subsection (a).”<sup>5</sup> The statute is thus specific that the “Commission” not the Bureau, must grant any extension and that it must do so upon a finding that the extension is “necessary” to meet the purposes of section 10(a). Accordingly, the Order is in conflict with the plain and unambiguous language of the statute and the Commission should require the WCB to act upon the Fones4All petition within the one-year statutory deadline, as required by section 10, or alternatively, the Commission must make a reasoned finding explaining the why it is necessary for the Commission to extend the one-year deadline established in section 10.

## **I. BACKGROUND**

On July 1, 2005, Fones4All filed a “Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and section 1.53 of the Commission’s Rules” (“Petition”) asking the Commission to exercise its forbearance authority under section 10 of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. § 160 to forbear from application of section 51.319(d) of the Commission’s rules. On August 15, 2005 the Commission established a pleading cycle seeking public comment on the Petition, with an initial comment deadline of October 14, 2005 and a reply comment deadline of November 14, 2005.<sup>6</sup> Since that time, Fones4All has held numerous meetings with Commissioners, their advisors and Bureau staff in order to further address the

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<sup>4</sup> *Id.*

<sup>5</sup> 47 U.S.C. § 160(a) (emphasis added).

<sup>6</sup> See *Public Notice*, Pleading Cycle Established for Comments on Petition for Forbearance of Fones4All Corp. Pursuant to 47 U.S.C. § 160(c), WC Docket No. 05-261, DA 05-2288 (rel Aug. 15, 2005).

issues raised in the Petition. On the eve of the one-year deadline for action on the Petition, the record in this proceeding is complete and clearly compels the Commission to grant the Petition.

In its reply comments, in subsequent filings, as well as in many *ex parte* meetings with Commission staff, including a meeting with the Commission's Office of General Counsel, and WCB staff,<sup>7</sup> Fones4All has indicated that the record in this proceeding is complete and that the record clearly demonstrates that grant of the Petition is warranted, and further, that there is no need for the Commission to extend the one-year statutory deadline established by section 10.<sup>8</sup> Indeed, Fones4All has specifically asserted on numerous occasions that the Bureau, acting on delegated authority, may not grant itself an extension of the section 10 deadline, and even if it were so authorized, no such extension is "necessary" within the meaning of section 10.<sup>9</sup> Accordingly, the Bureau's June 8 Order exceeds its delegated authority and otherwise violates section 10 of the Act.

## II. QUESTIONS PRESENTED

(1) Whether the Bureau's June 8 Order, issued pursuant to a claim of delegated authority and purportedly extending the twelve month statutory deadline established in section 10(c) for action on the Petition file by Fones4All (a) exceeded the bounds of the Bureau's delegated authority and (b) violates Commission precedent and section 10(c) of Communications Act of 1934, as amended, 47 U.S.C. § 160, which provides that any petition filed under section 10 shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one-year after the Commission receives

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<sup>7</sup> See e.g. *Ex Parte* Notification, WC Dockets 05-261, 04-313, 01-338, Letter from Ross A. Buntrock to Marlene Dortch (Mar. 10, 2006).

<sup>8</sup> Accordingly, the WCB had ample "opportunity to pass" on the questions presented herein, but it chosen not to do so.

<sup>9</sup> See e.g. Fones4All Reply Comments, WC Docket 05-261 (Nov. 14, 2006) at 19-20; Fones4All Notice of Written *Ex Parte*, WC Docket 05-261 (May 18, 2006).

it, unless the one-year period is extended by the Commission pursuant to a Commission finding that an extension is necessary to meet the requirements of subsection (a) of section 10.

**III. THE WIRELINE COMPETITION BUREAU EXCEEDED ITS DELEGATED AUTHORITY AND VIOLATED SECTION 10(C) OF THE ACT WHEN IT GRANTED ITSELF A 90 DAY EXTENSION OF THE SECTION 10 TWELVE-MONTH DEADLINE**

Section 10 of the Act is very clear: “The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a).”<sup>10</sup> The statute accordingly leaves no room for doubt that it is the “Commission” and not the Bureau that must grant any extension and that the Commission must do so upon a finding that the extension is “necessary” to meet the purposes of section 10(a). It clearly violates the plain language of section 10 for the WCB, acting on its own motion and without any apparent prior consultation with the Commission, to extend this statutory twelve-month deadline.

The Commission’s own rules demonstrate that the WCB may not act on delegated authority to extend the statutory deadline. Specifically, section 0.91(f) of the Commission’s Rules permits the Bureau to “[carry] out the functions of the Commission under the Communications Act of 1934, as amended, except as reserved to [the] Commission under Sec. 0.291.”<sup>11</sup> Section 0.291(2) states that the Bureau shall not have authority to act on issues “which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines.”<sup>12</sup> The Commission has not established criteria for determining when and if the extension specifically permitted by statute in section 10 of the Act is “necessary,” and

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<sup>10</sup> *Id.*

<sup>11</sup> 47 C.F.R. § 0.291.

<sup>12</sup> *Id.*

in other contexts, the Commission has interpreted the term “necessary” to establish a very high bar, not a page of boilerplate.

Even if the Bureau were acting within the scope of properly delegated authority (which it was not), it is unclear why the extension was “necessary” or how the 90 day extension could be effectively used by the Bureau without even briefing the Commission on the merits of the underlying Petition, determining whether or not there are any new or novel questions of fact, law or policy, and receiving some signal from a majority of the “Commission” that an extension of time is warranted under these particular circumstances. As noted herein, section 10 restricts extension of the statutory forbearance deadline to cases only where such extension is “necessary.” The Order issued by the Bureau, however, does not even use the word “necessary,” let alone offer any substantive explanation related to the need for extending the deadline.

Although the Commission has acted on numerous past occasions to extend the section 10 deadline without establishing criteria for its decision, one cannot infer from this action that the statutory basis for the extension identified in section 10 is meaningless, nor may one infer that the Bureau may extend the deadline without even consulting the Commission. Rather, the opposite is true, and the Commission must determine upon review of the Order whether the delegation to WCB is appropriate and, if so, whether the WCB properly determined that extending the statutory deadline was “necessary” under section 10. Fones4All submits that the answer to each of these questions is “no.”

In sum, the question of whether an extension is “necessary” under section 10 is a novel question of fact, law or policy that may not be resolved under existing Commission precedent, and therefore, may not be answered by the Bureau acting on delegated authority. Indeed, as Commissioner Furchgott-Roth observed, the only criterion which the Bureau seems to follow is

that they will routinely grant section 10 extensions.<sup>13</sup> Clearly, section 10 does not contemplate a routine extension the twelve-month deadline.

#### IV. REQUEST FOR RELIEF

For the reasons set forth above Fones4All respectfully requests that the Commission overturn the Order and find that (a) the Bureau may not act on delegated authority to extend the section 10 twelve-month statutory deadline for action upon Fones4All's Petition, or alternatively (b) to the extent the Bureau does possess the requisite delegated authority to extend the section 10 twelve-month deadline, find that the Bureau failed to provide a reasoned written explanation of why the 90-day extension was "necessary" in this case, as required by section 10(c) issue.

In either case, the Commission should either issue an order (a) resolving the Fones4All Petition within the one-year statutory deadline, as required by section 10; or alternatively (b) issue an order setting forth a reasoned explanation as to why an extension of the twelve-month statutory deadline to act upon the Fones4All Petition is "necessary." The Commission also should provide such other relief that the Commission finds appropriate.

Respectfully submitted,



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June 28, 2006

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<sup>13</sup> See Dissenting Statement of Commissioner Harold Furchtgott-Roth, Memorandum Opinion and Order, *Petition of the Ameritech Corporation for Forbearance from Enforcement of Section 2759a) of the Communications Act of 1934*, 15 FCC Rcd 7066( 1999).

**CERTIFICATE OF SERVICE**

I, Edilma Carr, hereby certify that on this 28<sup>th</sup> day of June 2006, I served copies of the foregoing "**Application for Review**" to the following parties via hand delivery, electronic mail or by first-class mail, postage prepaid, as indicated:

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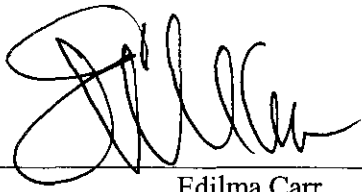
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